

NO. S251879

SUPREME COURT
FILED

IN THE

NOV 20 2018

SUPREME COURT OF CALIFORNIA

Jorge Navarrete Clerk

FIRST AMENDMENT COALITION,

Deputy

Petitioner,

v.

GOVERNOR OF THE STATE OF CALIFORNIA,

Respondent

In Re The Matter of Petitioner's Motion to Unseal

**PETITIONER'S MOTION TO UNSEAL
CLEMENCY-RELATED COURT RECORDS**

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1. On behalf of the public, Petitioner First Amendment Coalition (“FAC”) respectfully requests that this Court issue an order directing the Clerk of the Court to unseal the Request for Recommendation for Clemency and the Record lodged by Governor Jerry Brown in Case Number S251879, involving former state Sen. Roderick Wright, and further, to allow access to any other pending clemency requests, records, and related materials (collectively, “Clemency Materials”) currently filed under seal with this Court and prospectively, all future requests filed in this Court. Upon information and belief, such records are currently filed with this Court under seal, and after a judicial determination has been made with respect to clemency, are sometimes returned to the Governor.

INTEREST OF PETITIONER

2. The First Amendment Coalition (“FAC”) is a non-profit organization based in San Rafael, California, with a mission to advance free speech, promote open government, and enable public participation in civic affairs. FAC’s activities include public education, legislative oversight, and litigation related to First Amendment rights and open government.

3. As further explained in the Declaration of David Snyder and Memorandum In Support of this Petition filed concurrently herewith, FAC was alerted to the process by which the Governor solicits an opinion from the Supreme Court under Article V § 8(a) of the California Constitution in September 2018, in response to media reporting that Governor Jerry Brown has issued a record number of pardons and clemency requests during his time in office. *See* Declaration of David Snyder (“Snyder Decl.”), ¶¶ 3, 7. Media accounts report that Governor Brown has granted over 1,000

pardons, in contrast with less than twenty pardons granted by former Governor Arnold Schwarzenegger and zero pardons granted by former Governor Gray Davis. Snyder Decl., Ex. A. In addition, Governor Brown has issued 82 commutations, which grant parole hearings to individuals previously sentenced without parole – this number, too, is staggeringly high compared to his predecessors. Snyder Decl., Ex. A. Some of these clemency actions involve twice-convicted felons and are therefore weighed by this Court.

4. In response to media reporting and what the Executive Director of FAC determined to be a strong public interest in clemency procedures, FAC pursued public access to the clemency records in one particular case related to former state Sen. Roderick Devon Wright, Case Number S251879. Snyder Decl., ¶¶ 6, 8–10. The Governor’s submissions in this case appear on this Court’s public-facing docket as two documents filed on October 10, 2018, entitled the “Request for Recommendation for Clemency” (the “Request”) and the “Confidential record from Governor’s Office,” consisting of “One Binder” (the “Record) (collectively, the “Wright Clemency Materials”). Snyder Decl, Ex. B.

5. FAC made a California Public Records Act request to the Governor’s Office for the Wright Clemency Materials. Snyder Decl., ¶ 8. In response, the Deputy Legal Affairs Secretary replied by letter dated October 18 that only the request filed with this Court, and not the record submitted therewith, would be released. Snyder Decl., ¶ 8. On November 1, 2018, FAC’s Legal Fellow visited the Office of the Court Clerk in San Francisco in an effort to view the Wright Clemency Materials. Snyder Decl., ¶ 9. The Clerk stated that the record could not be viewed by the public. Snyder Decl., ¶ 9.

6. On November 6, 2018, FAC, on behalf of the public, submitted a letter request to Supreme Court Clerk and Executive Officer Jorge E. Navarette requesting a copy of the Wright Clemency Materials and explaining the basis for their request, namely, the presumption of public access to court files and proceedings. Snyder Decl., ¶ 10, Ex. G. FAC's letter request referred to the Wright Clemency Materials and also requested access to similar clemency requests and records in other materials currently pending before this Court. Snyder Decl., Ex. G. FAC has not received a response to this letter request. Snyder Decl., ¶ 10.

7. FAC, like all members of the public, has a strong interest in observing and understanding the consideration and disposition of matters by this Court. That interest is heightened when the Governor is a party seeking clemency for public officials.

BACKGROUND

8. As explained in the Memorandum In Support of Petitioner's Motion filed concurrently herewith, the public has a right to inspect the Clemency Materials under the California Rules of Court, the common law, and the federal and state constitutions. These authorities guarantee the public the right to inspect court records absent articulated findings that the right must give way to a countervailing interest. The current procedure employed by this Court and the Governor's Office for Clemency Materials, however, does not abide by these federal and state requirements.

9. Upon information and belief, all clemency requests and supporting documents submitted by the Governor to this Court are automatically placed under an indefinite seal, apparently without articulated judicial findings that closure serves any interest, let alone one sufficient to overcome the strong presumption of public access.

10. The Clemency Materials are plainly court records to which the access right applies. When the Governor seeks to grant a pardon, reprieve, or commutation of sentence for a twice-convicted felon, the California Constitution requires that the Governor obtain a recommendation from the majority of this Court. Cal. Const. art. V, § 8(a) (stating that the Governor “may not grant a pardon or commutation to a person twice convicted of a felony except on recommendation of the Supreme Court, 4 judges concurring”).

11. Earlier this year, this Court clarified that it sees its role in this process as a “traditional judicial” function that “provide[s] a check on potential abuse of the power conferred on” the Governor. *See Procedures for Considering Requests for Recommendations Concerning Applications for Pardon or Commutation*, 4 Cal. 5th 897, 899 (2018). As part of its judicial function, this Court considers records submitted by the Governor, including the “application, together with all papers and documents relied upon in support of and in opposition to the application, including prison records and recommendation of the Board of Prison Terms.” Pen. Code § 4851. These records form the basis of this Court’s judicial determination and are therefore court records to which the access rights apply.

12. Yet, upon information and belief, the materials considered by this Court in deciding whether to recommend the grant of clemency are placed under seal by default and remain sealed indefinitely. This Court’s internal administrative rules explain that “[t]he papers and documents transmitted to the court by the Governor with the application often contain material that the Governor may have the right to withhold from the public.” Internal Court Rules at 11, citing Gov. Code §§ 6254(c), (f), & (l); Civ.

Code § 198.40(c). Based on the possible presence of materials the Governor “might” be entitled to treat as confidential, the Court treats the entire files as confidential “and does not make them available to the public.” *Id.*

13. As a result, although this Court operates in its traditional judicial capacity when reviewing claims for clemency for individuals convicted of two or more felonies, the judicial records reviewed by this Court in making its recommendation are perpetually sealed from public view, apparently with none of the requisite findings justifying such sealing.

14. In addition, the public has a profound interest in understanding these proceedings. Justice Rehnquist called clemency “the historic remedy for preventing miscarriages of justice where judicial process has been exhausted,” and “the ‘fail-safe’ in our criminal justice system.” *Herrera v. Collins*, 506 U.S. 390 (1993). When clemency is sought to correct mistakes in the criminal justice system, the public has an undisputedly strong interest in understanding those flaws in the criminal justice system. It is well-established that public oversight can improve functioning of the judicial system. Moreover, when clemency is sought as an act of executive mercy on individuals who are, in fact, guilty, the public has an interest in understanding whether the individuals pose a threat to the community. This is particularly true where the individual is a second time offender, as is the case with the applications that come before this Court for review.

15. The public also has an independent interest in overseeing the conduct of the Governor and any public officials to which clemency is granted, in order to root out public corruption. March 2018 Admin. Order at 899 (discussing the history of article V, section 8).

16. Finally, the public has a particular interest in understanding the clemency proceeding of Wright, due, in part, to Wright's former role as a state public official. The public's right to inspect public records is particularly high where the records reflect the workings of multiple branches of government. *F.T.C. v. Standard Fin. Mgmt. Corp.*, 830 F.2d 404, 410 (1st Cir. 1987) ("The appropriateness of making court files accessible is accentuated in cases where the government is a party: in such circumstances, the public's right to know what the executive branch is about coalesces with the concomitant right of the citizenry to appraise the judicial branch."). Here, the Wright Clemency Materials will inform the public about the workings of the Governor's office, the Board of Parole Hearings, and the various public agencies involved in the original criminal prosecutions of Wright. Moreover, the public interest in understanding judicial procedures related to public corruption and allegations of harm to the public — such as the allegations brought against Wright in his criminal prosecutions — is particularly high.

REQUEST FOR RELIEF

17. Petitioner FAC requests that this Court issue an Order directing the Clerk of this Court to promptly unseal the Governor's request, and full record currently on file in this Court, for the matter of clemency for Roderick Wright, Case No. S251879.

18. Petitioner FAC further requests this Court issue an Order directing the Clerk of this Court to promptly unseal any other pending clemency requests, records, and related materials currently filed under seal with this Court.

19. Finally, Petitioner FAC respectfully requests that this Court grant prospective relief in the form of a change in Court procedure in clemency matters to ensure that the documents for clemency files are only sealed after a review and

articulated, on-the-record findings by the Court. Petitioner requests public access to these materials in future clemency matters immediately upon filing with this Court, and, to the extent sealing or redaction of individual records is necessary, Petitioner requests that such sealing will be temporary and revisited after this Court has made its clemency recommendation.

20. As the Court considers this motion, Petitioner FAC respectfully requests that the Court retain copies of the Wright Clemency Materials, as well as Clemency Materials related to other pending requests, if the Court returns originals of such materials to the Governor.

21. Petitioner FAC seeks any further relief that the Court deems just and proper.

Dated: November 20, 2018

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